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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. [redacted]74

BERNICE FEITLER and IRWIN FEITLER, Individually and Trading as GARDNER & COMPANY,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Bernice Feitler and Irwin Feitler, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered January 28, 1953. Petition for rehearing denied February 19th, 1953. This case was before the Circuit Court on petition to review an order of the Federal Trade Commission. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U.S.C.A. Sec. 347). This case is reported in 201 F. (2d) 790. The opinion is set out R. 144-153.

SUMMARY AND SHORT STATEMENT OF MATTERS INVOLVED.

The instant case is in conflict with the following cases: *Industrial Association of San Francisco, et al.* v. *U. S.*, 268 U. S. 64; *Federal Trade Commission* v. *A. P. W. Paper Co., Inc.*, 328 U. S. 193; *Federal Trade Commission* v. *Klesner*, 280 U. S. 19; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643; *International Union, Local 262, et al.* v. *Gazzam*, 339 U. S. 532; *Twin City Co.* v. *Harding Glass Co.*, 283 U. S. 353; *Erie Railroad Co.* v. *Tomkins*, 304 U. S. 64; *Keller* v. *U. S.*, 213 U. S. 138; *U. S.* v. *Vassar*, 72 U. S. 452; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Reilly, Postmaster* v. *Pinkus*, 338 U. S. 269; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608; *Federal Trade Commission* v. *Keppel*, 291 U. S. 304; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212; *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483.

The complaint herein charged in substance that petitioners manufacture, sell and distribute in interstate commerce devices known as push cards and punch boards; that these push cards and punch boards are prepared so as to involve games of chance or lottery schemes when used in intrastate commerce to distribute merchandise to the consuming public; that many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing merchandise by means of these lottery devices; that substantial trade has been thereby unfairly diverted from competitors selling similar merchandise who do not use these devices to sell their merchandise; that the petitioners thus supply to, and place in the hands of others the means and instrumentalities of engaging in unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act; and that the acts and

practices of petitioners are all to the prejudice and injury of the public and constitute unfair acts and practices within the intent and meaning of said act.

Petitioners' answer denied that the said punch boards and push cards were used to make sales or distribute merchandise to the consuming public, denied that many members of the purchasing public have been induced to trade or deal with retailers using said devices; denied that substantial trade has been unfairly diverted from competitors not using said devices, and denied that petitioners supplied to and placed in the hands of others the means of and instrumentalities for engaging in unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

The Commission introduced its evidence at hearings held in several widely scattered locations. After the Commission had concluded the introduction of its testimony the petitioners requested the Commission to set and conduct hearings at specified locations where petitioners would have the opportunity to introduce evidence to establish the matters alleged in their answer. The trial examiner denied the request for such hearings and refused to conduct hearings at places requested by the petitioners. The trial examiner's ruling is based upon rather a peculiar ground. He ruled that the petitioners could only introduce testimony which would negative the testimony introduced by the Commission and that petitioners could only have hearings conducted in the same locations where the Commission had held hearings (R. 35-37). The Commission sustained the trial examiner's ruling (R. 33). The trial examiner closed the taking of testimony without affording the petitioners hearings at the requested locations. The findings substantially follow the allegations

of the complaint. However, in spite of the fact that the petitioners were not afforded the opportunity to introduce their evidence to show the circumstances surrounding the use of punch boards to distribute merchandise made the following finding:

> "Such retail dealers have competitors who sell or distribute like or similar articles of merchandise. Said competitors are faced with the alternative of also using push cards and punch boards and other similar devices in connection with the sale and distribution of their merchandise or suffering the loss of substantial trade."

The Commission then entered the following order. It is Ordered that the respondents, (petitioners here) do forthwith cease and desist from:

> "Selling or distributing in commerce, as 'commerce' is defined in the Federal Trade Commission Act, push cards, punch boards, or other lottery devices, which are to be used or may be used in sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme." (R. 25).

The following is a portion of the Court's opinion:

> "In the motion to set aside the cease and desist order there are set out a number of proposed stipulations of testimony, which apparently were not signed by counsel supporting the complaint. It is the contention of petitioners that the trial examiner erred in striking evidence tending to prove the matters set out in the proposed stipulations and in refusing requests for hearings at several cities to take testimony as to such matters.
>
> The evidence sought to be introduced by petitioners consisted substantially of the following: (1) The persons who patronize punch boards do so only to satiate an appetite for gambling, and not to procure merchandise; (2) people who desire to buy merchandise do not

resort to punch boards for this purpose; (3) punch boards are operated only in such establishments as taverns, pool halls and other places where people are encouraged to loiter, and not in strictly retail stores; (4) distribution of merchandise by punch board does not divert any sales from the ordinary channels of trade; (5) the merchandise distributed by means of punch boards consist largely of novelty items, candy and tobacco; (6) punch boards are not sales aids or sales stimulators.

Petitioners contend that this evidence, if admitted, would have destroyed the factual basis upon which the jurisdiction of the Commission in this case rests. The argument is that gambling by punch board is no more opposed to the public policy of the United States than are other forms of gambling. Since the Commission does not have authority to stop interstate shipment of other gambling devices, such as dice, roulette wheels, etc., it is urged that the Commission's power in this case must rest upon the fact that the use of punch boards in the distribution of merchandise has some effect upon trade or commerce which is different from, or greater than, the effects of other forms of gambling which involve only the exchange of money. Petitioners sought to prove that the operation of punch boards has no such effect, that such operation does not compete with other forms of merchandising, and that therefore the interstate shipment of these devices, like the shipment of other gambling devices, is outside the orbit of the Commission.

We agree that the Commission's authority does not extend to the interstate shipment of gambling devices as such, but only to such shipments as amount to unfair trade practices. *Lichtenstein* v. *Federal Trade Commission, supra.* But the jurisdiction of the Commission in this case does not depend upon any particular effect of the operation of punch boards and push cards upon merchandising competition, but upon the single fact that these devices, unlike most other gamb-

ling devices, are used as a *means of selling or distributing merchandise* which is opposed to the public policy of the United States. This was made abundantly plain in the *Lichtenstein* case, *supra.* It is the fact that the interstate shipment of these devices facilitates *a kind of merchandising* which induces and encourages the public to gamble which makes such shipment an "unfair trade practice." Proof that the use of punch boards in the gambling disposition of merchandise has no effect upon trade in the same kinds of merchandise by other means could not have affected the question of the Commission's jurisdiction.

Petitioners, as we understand their argument, do not contend that the proof rejected by the trial examiner was offered for any purpose other than to show that the Commission did not have jurisdiction over the practice here in question. Indeed, we cannot see how such proof could have aided petitioners' case on the merits. The offered evidence, if admitted, would have been strongly probative of the gambling use of push cards and punch boards in the distribution of merchandise—the very circumstance which brands the shipment of these devices in interstate commerce an *unfair* act or practice. Petitioners were not prejudiced by the challenged rulings of the trial examiner."

QUESTIONS PRESENTED.

I.

Can there be under our dual system of government a Federal public policy as to intrastate transactions which have absolutely no effect on interstate commerce?

II.

Can the Federal Circuit Court of Appeals create and legislate a Federal public policy as to intrastate transactions when there is no such public policy created or contained in the Constitution or in any act of Congress?

III.

Is the principle of *De minimis non curat lex* applicable to the Federal Trade Commission Act?

IV.

Is an act, method or practice which is neither unfair to competition or purchasers and has no effect upon merchandising competition or upon the trade in the same kind of merchandise by other means, an unfair act, method or practice within the intent and meaning of the Federal Trade Commission Act?

V.

Was the hearing granted the petitioners in violation of the Constitutional Right to due process of law?

VI.

Has the Commission jurisdiction to restrain the selling and distributing of a commodity or is its jurisdiction limited to the restraining of unfair methods, acts or practices which are used to sell the products, that is, limited to restraining unfair marketing methods?

VII.

Was the Court below justified in ruling that plaintiff's punch boards were never used as educational games? Did such a ruling in the face of the fact that petitioners were not permitted to introduce their evidence on this question deprive the petitioners of their Constitutional Right to a fair and impartial hearing?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

The court below in holding that the intrastate use of gambling devices as a means of selling or distributing merchandise is opposed to the public policy of the United States, decided a Federal question in a way probably in conflict with applicable decisions of this Court as laid down in the following cases; *International Union, Local 262, et al.* v. *Gazzam,* 339 U. S. 532; *Twin City Co.* v. *Harding Glass Co.,* 283 U. S. 353; *Erie Railroad Co.* v. *Tomkins,* 304 U. S. 64; *Keller* v. *U. S.,* 213 U. S. 138; *U. S.* v. *Vassar,* 72 U. S. 462; and *Carter* v. *Carter Coal Co.,* 298 U. S. 238.

II.

The court below in holding that the jurisdiction of the Commission in the case at bar does not depend upon any particular effect of the operation of punch boards upon merchandising, but rests upon the simple fact that these devices, unlike most other gambling devices, are used as a means of selling or distributing merchandise which is opposed to the public policy of the United States decided a Federal Question in a way probably in conflict with applicable decisions of this Court as laid down in the following cases; *Industrial Association of San Francisco, et al.* v. *U. S.,* 268 U. S. 64; *Federal Trade Commission* v. *A. P. W. Paper Co., Inc.,* 328 U. S. 193; *Federal Trade Commission* v. *Klesner,* 280 U. S. 19; *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643. The rule of law announced in these cases is that the rule of *De Minimis non curat lex* is applicable to the case at bar.

III.

The court below in holding that the Commission's jurisdiction rests "upon the single fact that these devices, unlike most others gambling devices, are used as a means of selling or distributing merchandise which is opposed to the public policy of the United States" decided a Federal question in a way probably in conflict with applicable decisions of this Court as announced in the following cases; *Reilly, Postmaster* v. *Pinkus*, 338 U. S. 269; *Federal Trade Commission* v. *A. P. W. Paper Co., Inc.*, 328 U. S. 193; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643.

The above cases establish the rule that the only acts, methods, or practices which come within the purview of the Federal Trade Commission Act are acts, methods or practices which are either unfair to competition or are unfair to purchasers in such a way that purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to the product.

IV.

The court below in holding that the Commission has jurisdiction to restrain the selling and distributing of a product decided a Federal question in a way probably in conflict with the applicable decisions of this Court as announced in the following cases; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643; *Federal Trade Commission* v. *A. P. W. Paper Co., Inc.*, 328 U. S. 193; *Federal Trade Commission* v. *Keppel*, 291 U. S. 304; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608; *Federal*

Trade Commission v. *Winsted Hosiery Co.*, 258 U. S. 483; *Reilly, Postmaster* v. *Pinkus*, 383 U. S. 269.

The above cases held that the Commission's authority is limited to the restraining of marketing method, that is, the Commission does not have the authority to restrain the selling and distributing of a product; its authority is limited to the restraining of the acts, methods or practices used in the selling of a product.

V.

The court in holding as set out above decided a Federal question in a way probably in conflict with applicable decisions of this court as announced by the following cases; *Federal Trade Commission* v. *A. P. W. Paper Co., Inc.*, 328 U. S. 193; *Federal Trade Commission* v. *Klesner*, 280 U. S. 19; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608.

The above cases laid down the rule that the public interest essential to the jurisdiction of the Commission is that interest which the public has in restraining methods, acts or practices which are either unfair to competition or to purchasers.

VI.

The court holding that the Commission's jurisdiction rests upon the single fact that punch boards are used as a means to violate the public policy of the United States decided an important Federal question in a way probably in conflict with an applicable decision of this Court as laid down in the case of *Federal Trade Commission* v. *Keppel*, 291 U. S. 394. In this case this Court laid down

the rule that the Federal Trade Commission statute does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of business men.

VII.

The decision in the case at Bar is clearly in conflict with the decision by the Third Circuit Court of Appeals in the case of *Scientific Manufacturing Co.* v. *Federal Trade Commission*, 124 F. (2d) 640.

It is respectfully submitted that a writ of certiorari should issue in this matter.

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No.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

This case comes before the Court on a petition for Certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit wherein an order to cease and desist issued by the Federal Trade Commission against petitioners based on Sec. 5 of the Federal Trade Commission Act, 52 Stat. 111, 15 U.S.C.A. Sec. 45 was affirmed. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U.S.C.A., Sec. 347).

STATEMENT OF THE CASE.

The following statement contains all that is material to a full consideration of the questions presented.

The allegations of the complaint which are material herein are in substance; that petitioners ship only punch boards and push cards, no other merchandise; that when retailers use the boards to distribute merchandise, which merchandise they had secured from other sources, the merchandise is sold or distributed by chance; that a substantial amount of trade is diverted from competitors who do not use punch boards to competitors that do use them, that thus the petitioners supply to and place in the hands of others the means and instrumentalities of engaging in unfair methods of competition within the intent and meaning of the Federal Trade Commission Act.

The answer denies that retailers use the boards to sell merchandise; that substantial amount of trade is diverted and that they thus supply to and place in the hands of others instrumentalities of engaging in unfair methods of competition within the intent and meaning of the Federal Trade Commission Act.

The Commission held hearings in different locations at which it introduced its evidence. The petitioners then requested the trial examiner to conduct hearings in certain specified locations in order that the petitioners would have an opportunity to introduce their evidence. The trial examiner refused to do so and ruled that the only evidence petitioners would be allowed to introduce would be evidence which would negative the Commission's evidence and that the petitioners could only have hearings at the same locations at which the Commission held hearings.

After making finding of facts the court issued the following order; It Is Ordered that the respondents (petitioners herein) do forthwith cease and desist from;

> "Selling or distributing in commerce, as 'commerce' is defined in the Federal Trade Commission Act, push

cards, punch boards, or other lottery devices, which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance gift enterprise or lottery scheme." (R. 25).

The Circuit Court of Appeals affirmed the order. The material part of the opinion is set out *Supra* P. 4-5 and 6.

SPECIFICATION OF ERRORS INTENDED TO BE ARGUED.

1.

The Court erred in holding that the intrastate use of punch boards as a means of selling or distributing merchandise is opposed to the public policy of the United States.

2.

The Court erred in failing to invoke the rule of *De minimis non curat lex.*

3.

The Court erred in holding that it was immaterial what effect petitioners' acts had upon competition or purchasers.

4.

The Court erred in holding that the petitioners' rights were not prejudiced by the Commission refusing to allow them to introduce their evidence.

5.

The Court erred in holding that the Commission has jurisdiction to restrain the selling and distributing of a commodity.

6.

The Court erred in holding that petitioners' punch boards were never used to conduct an educational game.

7.

The Court erred in failing to hold that the public interest herein must be substantial and specific also that the public interest is limited to the interest the public has in the restraining of acts, methods or practices which are either unfair to competition or purchasers or both.

SUMMARY OF ARGUMENT.

Our first point is that the court based its entire holding on the erroneous rule that the intrastate use of punch boards to distribute merchandise is against the public policy of the United States. Our position is that under the dual system of government created by the Constitution there cannot be a Federal public policy concerning such intrastate transactions. *International Union, Local 262, et al.* v. *Gazzam,* 339 U. S. 532; *Twin City Co.* v. *Harding Glass Co.,* 283 U. S. 355; *Erie Railroad Co.* v. *Tomkins,* 304 U. S. 64; *Keller* v. *U. S.,* 213 U. S. 138; *U. S.* v. *Vassar,* 72 U. S. 462; and *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *U. S.* v. *Halseth,* 342 U. S. 277.

Our second point is that the number of punch boards used to distribute merchandise and the amount of merchandise distributed by such use percentage wise is so infinitesimal that the rule of *De minimus non curat lex* should apply. *Industrial Association of San Francisco, et al.* v. *U. S.,* 268 U. S. 64; *Federal Trade Commission* v. *A. P. W. Paper Co., Inc.,* 328 U. S. 193; *Federal Trade Commission* v. *Klesner,* 280 U. S. 19; *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643.

Our next point is that the court erred in holding that it is immaterial what effect petitioners' act had upon competition or purchasers. Petitioners contend that the only acts, methods or practices which are unfair within the meaning and intent of the Federal Trade Commission Act are acts, methods or practices which are either unfair to competition or unfair to purchasers. The Court however held that the furnishing the means and instrumentalities of selling or distributing merchandise in intrastate commerce by the use of chance is an unfair act within the meaning of the statute. *Reilly, Postmaster* v. *Pinkus,* 338 U. S. 269; *Federal Trade Commission* v. *A. P. W. Paper Co., Inc.,* 328 U. S. 193; *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608; *Federal Trade Commission* v. *Raladam Co.,* 328 U. S. 643.

Our next point is that the court erred in holding that the Commission has jurisdiction to restrain the selling and distributing of a commodity. The order herein does restrain petitioners from selling or distributing their product. Petitioners position in this regard is that the Commission's authority is limited to restraining the use of acts, methods and practices, that is, the restraining of unfair acts, methods or practices which are used or resorted to for the purpose of selling the commodity. *Reilly, Postmaster* v. *Pinkus,* 338 U. S. 269; *Federal Trade Commission* v. *A. P. W. Paper Co., Inc.,* 328 U. S. 193; *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608; *Federal Trade Commission* v. *Raladam Co.,* 328 U. S. 643.

Our next point is that the court erred in holding that petitioners punch boards are not used as educational games, in face of the fact that petitioners were not allowed to introduce their evidence.

Our next point is that the public interest essential to confer jurisdiction upon the Commission must be specific and substantial. That the specificity of the public interest is that the public has an interest in restraining unfair acts, methods or practices which are unfair to either competition or purchasers, the Commission's authority does not extend to the interest that the public may have in the restraining of acts, methods or practices which are against the public policy of the United States, they are not unfair either to competition or purchasers. *Federal Trade Commission* v. *A. P. W. Paper Co., Inc.*, 328 U. S. 193; *Federal Trade Commission* v. *Klesner*, 280 U. S. 19; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608.

ARGUMENT.

There Cannot Be A Federal Public Policy in Relation to Intrastate Transactions Which Transactions Have No Direct Effect Upon Interstate Commerce.

The court in the case at Bar rested its entire opinion upon the erroneous holding that the Commission's jurisdiction rested upon the sole fact that the intrastate use of punch boards to distribute merchandise is against the public policy of the Government of the United States.

Under our dual system of government as established by the constitution of the United States it is impossible to have a Federal public policy concerning intrastate transactions which do not have any effect upon interstate commerce. Such a policy would be a clear and unjustifiable encroachment by the Federal Government upon the sovereign rights of the states and would be clearly in direct conflict with the Tenth Amendment. Such a rule of law would clearly be in conflict with the admonition set out in the case of *Keller* v. *U. S.*, 213 U. S. 138, 149;

> "To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in *Texas* v. *White*, 7 Wall. 700, 725, that 'the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States'."

To commence our discussion let us first have a clear and complete understanding of the law of public policy. The following from the case of *Julien* v. *Model Building, Loan & Investment Co.*, 92 N. W. 561, 565, 116 Wis. 79, 61 L.R.A. 668 is the clearest explanation of this point

that we have found. The Court in this case at page 565 said,

> "It is the province of the statesman and not of the lawyer to discuss, and of the *Legislature to determine, what is best for the public good,* and to provide for it by proper enactments. It is the province of the judge to expound the law, *to declare public policy as he finds it in the unwritten and written law.* Public policy is a proper ground for a decision only in the sense of the policy of the law, *not in the sense of mere judicial notions as to what is best for the public good.*" (Emphasis supplied)

This Court in the case of *Building Service Employees International Union, Local 262 et al.* v. *Gazzam*, 339 U. S. 532, at 537 & 538 said,

> "The public policy of any state is to be found in its constitution, acts of the Legislature, and decisions of its courts. Primarily it is for the lawmakers to determine the public policy of the State, *Twin City Co.* v. *Harding Glass Co.*, 283 U. S. 353."

In following this discussion it is vital that we bear in mind that the practice of selling goods by means which involve a game of chance, gift enterprise, prize or lottery, is always an intrastate transaction. This fact is admitted, there is absolutely no question about it.

It is important to note that the Court in announcing this rule did not refer to any provision of the Constitution or any enactment of Congress. It appears that the Court just announced the rule without having any legislative enactment upon the subject.

Therefore let us first discuss the limits of the power of the court with regard to the establishment of public policy. From the above quotations it is self-evident that the courts do not have the power to create, initiate or legislate a prin-

ciple of public policy; their power is strictly limited to declaring public policy as it exists in the law of the forum in which the court has jurisdiction. That is to say, that the Federal Courts do not have power to declare a Federal public policy, their authority is limited to announcing the Federal Public Policy as is found either in the Constitution or a constitutional enactment of Congress. If the Court's power is not confined within these limits the courts would be exercising clearly a legislative function which certainly would be in direct violation of the Constitution's division of the Legislative, Judicial and Executive functions. As the judiciary does not have power to create a federal public policy concerning intrastate transactions the next questions are, first, does the constitution declare a public policy towards the intrastate use of chance to distribute merchandise? (2) Has Congress passed a constitutional enactment declaring such a public policy? (3) Would Congress have the power to pass such an act, with regards to such intrastate transactions?

If there is to be found in the Constitution that such a practice is contrary to the public policy of the Federal Government, the law must be that by virtue of the Constitution the common law is made a part of and incorporated into Federal Law. In other words, if the common law is not a part of the Federal Law, then the Constitution does not contain any pronouncement that intrastate transactions are contrary to a Federal Public policy.

The law is settled beyond controversy that the Constitution does not incorporate the common law as a part of the Federal Law. On this point this Court in the case of *Erie Railroad Co.* v. *Tomkins*, 304 U. S. 64, at 78:

> "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be

> local in their nature or general, * * *. And no clause in the constitution purports to confer such a power upon the Federal Courts."

In the same case at page 79 the court says that there cannot be a rule of law "that there is a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute;". The court therein emphasizes the fact that courts do not have "the power to use their judgment as to what the rules of common law are;". The court then goes on and says,

> "But the law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else * * * The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word."

In this connection it is well to consider the case of *Keller* v. *U. S.*, 213 U.S. 138. This case involved an enactment by Congress declaring it a crime for anyone to harbor an alien prostitute. Certainly if any acts which are exclusively intrastate should be declared against the Federal public policies, prostitution should, if it does not lead the list, it should be among the very top. However, the court held the act unconstitutional and in doing so at page 148 said,

> "That there is a moral consideration in the special facts of this case, that the act charged as within the scope of the police power, is immaterial, for, as stated, there is in the Constitution no grant to Congress of the police power". And at 149 said,

"To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in *Texas* v. *White*, 7 Wall. 700, 725, that 'the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States'."

In connection with Congress' power over intrastate transactions, the Supreme Court said in the case of *U. S.* v. *Vassar*, 72 U.S. 462 and 71,

"Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the states. No interference by Congress with the business of citizens transacted within a state is warranted by the constitution except such as is strictly incidental to the exercise of powers clearly granted to the Legislature".

In the case of *Carter* v. *Carter Coal Co.*, 298 U.S. 238 at 295, the court said,

"The preservation of the states and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. * * * Every journey to a forbidden end begins with the first step; and the danger of such a step by the Federal government in the direction of taking over the powers of the states is that the end of the journey may find the states despoiled of their powers * * *"

And the Court says at pages 291 and 292,

"The proposition, often advanced and as often discredited, that the power of the Federal Government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws

to promote the general welfare, have never been accepted but always definitely rejected by this court."

To hold that such a practice is contrary to the Federal public policy, is contrary to the case of *U. S.* v. *Halseth*, 342 U.S. 277. This case involved the question of shipping punch boards in interstate commerce which were to be used to distribute merchandise in intrastate commerce. The court held that such conduct did not violate any Federal Law whatsoever. This case clearly established that Congress has never and never intended to pass an act declaring that the intrastate use of chance to distribute merchandise is against the public policy of the Government of the United States.

From the above and foregoing it is established that the Federal Courts, that is the Judicial Branch of the Federal Government, does not have authority or power to establish, create, initiate, or formulate a Federal public policy concerning the use of chance to distribute merchandise in intrastate commerce; it is, also, established that the Constitution does not contain such a public policy, that Congress has not declared one and that Congress does not have the power to do so.

Therefore, it is self-evident that the practice of selling goods by means which involve a game of chance, gift enterprise, prize or lottery, is not contrary to the established public policy of the United States.

The Principle of De Minimis Non Curat Lex Should Be Applied to the Case At Bar.

This court in the case of *Industrial Association San Francisco, et al.* v. *U. S.*, 268 U. S. 64, 84, in applying the rule of *De minimis non curat lex* said,

"To extend the statute intended to reach and suppress real interferences with the free flow of commerce

among the states, to a situation so equivocal and so lacking in substance, would be to cast doubt upon the serious purpose with which it was framed."

Petitioners proffered, but rejected, evidence would have established among other things that the volume of merchandise distributed by the use of punch boards, percentagewise, is so small that the case at bar comes clearly within the rule of *De minimis non curat lex.*

The Commission ruled that this evidence was immaterial and the court below sustained such ruling upon the sole ground that:

> "* * * The Jurisdiction of the Commission in this case does not depend upon any particular effect of the operation of punch boards and push cards upon merchandising competition, but upon *the single fact* that these devices, unlike most other gambling devices, are used as a means of selling or distributing merchandise which is opposed to the public policy of the United States." (Italics provided)

The Court points out in its opinion (R. 148) that the evidence offered by the petitioners would establish that the use of punch boards is not really substantial and that the amount of mechandise distributed by their use percentagewise is infinitesimal. One of the facts which petitioners were desirous of establishing is that there is a marked difference between what is merchandising by gambling and gambling for merchandise. Merchandising by gambling is where an article of merchandise is sold and in connection with the sale the purchaser is given a chance to win an additional prize. Under such circumstances there is a sale of a product made which sale is induced by the element of chance. On the other hand, when a punch board is used there is no sale whatsoever, the player pays a small amount to take a chance, he either wins a prize or does not

receive anything for his money. This is clearly gambling for merchandise The appeal that is present in these two transactions is entirely different. Under the first type the appeal is to the purchaser to purchase the commodity because he knows that he is going to receive the commodity that he desires to purchase and that in addition he may win a valuable prize. While in the latter type, the player does not know whether or not he will receive any commodity, therefore the appeal present is solely to the gambling instinct. The petitioners' rejected evidence would establish that the appeal to play the punch boards does not play any part whatsoever in the merchandising field and is of very minor import in the field of gambling. Under such circumstances there is no substantial diversion of trade. In fact the selling of a chance is not in competition with selling merchandise. The petitioners' offered testimony would establish beyond doubt that punch boards are only found in places where petty gambling takes place and is never found in a retail establishment catering exclusively to the selling of merchandise, and that their use plays a minor part in the field of gambling and no part in the field of merchandising.

On the question of substantiality this court in the case of *F.T.C.* v. *Raladam Company, supra;* said

> The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of *it in a substantial degree,* and *this presupposes the existence of some substantial competition to be affected,* since the public is not concerned in the maintenance of competition which itself is without real substance.

This point is discussed further, hereinafter, under our sub-heading public interest.

As it seems self-evident to petitioners that the order sustained herein is far beyond the limits and realm of the Commission's authority, it is well to preface this portion of our discussion with this statement because this Court in the cases, *supra*, has laid down rather definitely the limits of and the realm within which the Commission's jurisdiction must be confined and when the Commission goes beyond these limits and issues an order the order thus issued must be set aside.

Our discussion will establish that this Court has held; (1) that the only acts which are unfair within the intent and meaning of the statute are acts which are either unfair to competition or unfair to consumers; (2) that the statute does not confer power upon the Commission to censor the morals of business men; (3) that the Commission's authority is limited to the restraining of the using of acts, methods or practices which are used for the purpose of securing sales, that is, marketing methods; (4) the Commission does not have power to stop the selling and distributing of a product; (5) that the public interests must be specific and substantial, the specificity of the public interest is confined to the interest the public has in restraining acts, methods or practices which are either unfair to competition or unfair to consumers, the public interest is not extended to the interest that the public may have in the elimination of acts, methods or practices which are contrary to public policy or public morals; (6) the requirement of substantially means the application of the rule of *De minimis non curat lex.*

The petitioners' contention is that the order issued herein violates every one of the above principles therefore the decision in the case at bar is contrary to this Court's holdings in all of the cases that we have set out herein

above and which we will now discuss. Therefore the order herein should be set aside.

Of course the statute granting the Commission's authority is the basis upon which the limit or extent of its jurisdiction must be found. On this point section V. of the Federal Trade Commission Act provides

> "* * * The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce (and) unfair or deceptive acts or practices in commerce." 15 U.S.C.A. Sec. 45 (A).

It is important to note that the Commission's authority is limited to the preventing of the *using*, we emphasize the word using, unfair methods of competition in Commerce and unfair acts or practices.

As the petitioners are charged only with the using of unfair acts the first problem is to determine what acts are unfair within the meaning of this statute and also to determine what is meant by using the said acts. After these two questions are settled a third question arises what is the nature of the public interest required to bring the using of unfair acts within the jurisdiction of the Commission. On this point the statute provides:

> "and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public it shall issue and serve * * * a complaint."

First we will discuss the question; what acts are unfair within the purview of the statute? Second, we will discuss the question; what is meant by the provision of the statute that the Commission is to prevent the *using* of unfair acts? And then we will discuss the question; what is the public interest necessary to sustain the Commission's jurisdiction?

To Come Within the Purview of the Federal Trade Commission Statute, An Act, Method or Practice Must Be Either Unfair to Competition or Unfair to Purchasers.

Petitioners' acts are neither unfair to competition or consumers, therefore, in the face of the above rule of law they are not within the purview of the Federal Trade Commission act.

This Court in the case of the *Federal Trade Commission v. A. P. W. Paper Co.*, 328 U.S. 193, *supra*, makes it very clear that an act, practice or method to be unfair within the meaning of the Federal Trade Commission Act must be either unfair to competition or unfair to consumer. In a footnote this Court on page 199 says:

> "In *F.T.C.* v. *Raladam Co.*, 283 U.S. 643, 647, 648, the Court had ruled that, 'The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree, and this presupposes the existence of some substantial competition to be affected, since the public is not concerned in the maintenance of competition which itself is without real substance'. The 1938 Amendment to Sec. 5 of the F.T.C. Act was designed to make 'the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor'."

As to what acts and practices are unfair within the above definition we set out the following from the case of *F.T.C. v. Royal Milling Co.*, 288 U.S. 212, at 217:

> "The result of respondent's acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin. We are of opinion that the purchasing

public is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial."

The following statement of Senator Wheeler, a senior member of the Conference Committee, referring to the action of the Supreme Court in the *Raladam* case, *supra*, stated at 83 Cong. Rec. 3255 (1938):

> "Section 5 of the present act is amended, first, by making unlawful 'unfair or deceptive acts or practices in commerce'. The present act makes unlawful 'unfair methods of competition,' and the Supreme Court has held that the Commission loses jurisdiction of a case where an actual or potential competitor is not involved. This amendment makes the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant injured by the unfair methods of a dishonest competitor."

To the same effect is the testimony of the late Commissioner Davis testifying before the House Committee on Interstate and Foreign Commerce hearings on H. R. 3143, 75th Cong., 1st Sess., pp. 6, 9 and 14. He testified as follows:

> "People engaged in trade deal with the consuming public, and whenever they engage in an unfair or deceptive practice, then it is not only unfair to their competitors, but it is unfair to the public, either way you put it, and if it is unfair to the public, *if it deceives the public and induces the public to trade* with them when they would not do it in the absence of those *false representations*, or *unfair trade practices*, it is inevitable that it is also unfair to the competitors."

Our discussion of the case of *Reilly, Postmaster* v. *Pinkus*, 338 U.S. 269 under the heading that the Commission cannot restrain the selling and distributing of a product, page 31 herein, is also pertinent on this point,

therefore, we incorporate it here as part of our presentation of this point.

From these quotations it is self-evident that the Federal Trade Commission's authority was originally limited to the prevention of methods which are unfair to competition, that the amendment of 1938 extended the Commission's authority only to the extent that the Commission in addition to protecting competition has authority to protect the consumer from practices which deceive purchasers into purchasing an article which they would not have purchased had they been correctly informed as to the product. So it is self-evident that the Commission's authority is not extended to protecting the general public against gambling generally or specifically to gambling for merchandise, especially when such gambling occurs exclusively in intrastate commerce.

Therefore, the act of shipping punch boards in intrastate commerce is not an unfair act within the statute.

The Commission Has No Authority to Restrain the Selling and Distributing of A Product, It's Authority Is Limited to the Restraining of Acts, Methods, and Practices Which Are Used to Make the Sale.

On this point in the case of *Reilly, Postmaster* v. *Pinkus*, 338 U.S. 269, at, 277, said:

> "It is not amiss to point out that the Federal Trade Commission does have authority to issue cease-and-desist orders in cases like this without findings of fraud. * * * But that remedy does not approach the severity of a mail fraud order. In *Federal Trade Commission* v. *Raladam Co.*, 316 U.S. 149, for instance, a business advertising its anti-fat product with extravagant statements similar in many respects to those the *respondent here was ordered to cease and desist from making such statements. Except for this, the business*

> *was left free to sell its product as before.* Unlike the Postmaster General, the Federal Trade Commission cannot bar an offender from using the mails, an order which could wholly destroy a business. * * * The strikingly different consequences of the orders issued by the two agencies on the basis of analogous misrepresentations emphasize the importance of limiting Post-office Department orders to instances where actual fraud is clearly proved." (Italics supplied)

The order in the case at bar does exactly that which this Court says the Commission cannot do; the Commission's order bars the petitioners from using the mails and all other forms of interstate transportation to distribute their punch boards in interstate commerce and in addition the order also wholly destroys their business. As is pointed out by the Court, there is a marked difference between cases wherein, as in the *Raladam* Case, the order simply restrains the use of some unfair method or act leaving the business free to sell its product as before and cases wherein the order restrains the selling of the product, as it does in the case at bar, thereby wholly destroying the business.

In using the *Raladam* case in the above quotation the Court certainly emphasizes the rule that the Commission cannot restrain the selling of a product because in the *Raladam* case the use of the product was dangerous to health, the Court said: " * * * the preparation is one which cannot be used generally with safety to physical health except under medical direction and advice." The proceeding therein was not against the selling or distributing of the product but was only against the false advertising of the benefits of it. In the quotation the Court points out that in the *Raladam* case the "respondent was ordered to cease and desist from making such statements. Except

for this, the business was left free to sell its product as before." This clearly sustains our point that petitioners must be left free to sell their product.

On this same subject this court in the case of *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, at 614 says that the Commission's authority is limited solely to the restraining of the *use of marketing.*

To the same effect are the holdings in; *Federal Trade Commission* v. *Keppel*, 291 U.S. 304; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212; *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483.

After a diligent search the petitioners have failed to find a case decided by this Court in which the court has held that the Commission has power or authority to stop the selling and distributing of a commodity, therefore, the petitioners feel safe in saying that this Court has never made such a holding and that the holding in the case at bar is clearly in conflict with all of the cases herein above discussed.

To Justify the Commission's Jurisdiction the Public Interest Must Be Specific and Substantial.

In the case of *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, this Court said:

> "To justify filing a complaint the public interest must be specific and substantial * * *"
>
> The specific facts established may show, as a matter of law, that the proceeding which it authorized is not in the public interest, *within the meaning of the act. If this appears at any time during the course of the proceeding before it, the Commission should dismiss the complaint.* (Italics provided) If instead, the Commission enters an order, and later brings suit to enforce it, the court should, without inquiry into the merits, dismiss the suit."

In this case the order was set aside on the ground that the proceeding therein was not to the interest of the public within the meaning and intent of the act.

As the public policy must be specific, the fundamental fallacy of the holding herein is that it is predicated on the theory that the Commission was created for the purpose of protecting the public generally, against all acts, methods and practices which are against public policy; that is to say, that every act, method, and practice which is against public policy or if it would be to the interest of the public to have it restrained is an unfair act, method, or practice within the purview of the statute. To the contrary, this Court has held that public interest, within the meaning of the act is limited to the interest that the public has in restraining methods, acts or practices which are either unfair to competition or consumers. This is made very plain from the following:

This Court in the case of *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643 *supra*, in discussing the public interest said:

> "In a case arising under the Trade Commission Act, the fundamental questions are, whether the methods complained of are 'unfair,' and whether, as in cases under the Sherman Act, they tend to the *substantial injury of the public by restricting competition in interstate trade and 'the common liberty to engage therein.'* The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of *it in a substantial degree*, and *this presupposes the existence of some substantial competition to be affected*, since the public is not concerned in the maintenance of competition which itself is without real substance. Compare *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291, 297-299, 74 L. ed. 431, 440, 441, 50 S. Ct. 89. * * *

"The authority of the commission to proceed, if that body believes that there has been or is being used any unfair method of competition in commerce, was then qualified in conference by the further requirement, not in the original bill—and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public.' By these additional words, protection to the public interest is made of paramount importance, but, nevertheless, they are not substantive words of jurisdiction, but complementary words of limitation upon the jurisdiction conferred by the language immediately preceding. *Thus, the commission is called upon first to determine, as a necessary prerequisite to the issue of a complaint, whether there is reason to believe that a given person, partnership or corporation has been or is using any unfair method of competition in commerce;* and that being determined in the affirmative, the commission still may not proceed unless it further appear that a proceeding would be to the interest of the public, and thas such interest is specific and substantial. *Federal Trade Commission* v. *Klesner,* 280 U.S. 19, 28, 74 L. ed. 1938, 145, 68 A.L.R. 838, 50 S. Ct. 1. Unfair trade methods are not per se unfair methods of competition.

"It is obvious that the word 'competition' imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors—that is to say, the trader whose methods are assailed as unfair must have present or potential *rivals in trade whose business will be, or is likely to be,* lessened or otherwise injured. It is that condition of affairs which the commission is given power to correct, and it is against *that condition of affairs, and not some other, that the commission is authorized to protect the public.* Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely as-

sumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions."

While the *Raladam* case was decided before the amendment of 1938, the public interest since the amendment is the same as it was before the amendment. The statute reads identically the same on this point and in the case of *Scientific Manufacturing Co.* v. *Federal Trade Commission*, 124 F. (2) 640 the court says:

Let us repeat a portion of that which is said in the *Raladam* case, *supra*:

> "It is that condition of affairs which the Commission is given power to correct, and it is against that condition of affairs, and not some other, that the commission is authorized to protect the public."

From this it is settled that unless the proceeding is against either an act, method, or practice which is unfair either to competition or consumers there is not present the public interest required to give the Commission jurisdiction to issue an order.

As the acts involved herein are not unfair to either competition or consumers, the facts are that, as a matter of law, this proceeding is not in the public interest, within the meaning of the act, therefore the order must be set aside.

Petitioners Are Entitled to Have Their Evidence Introduced.

In the case at bar petitioners' punch boards were designed so that they could either be used as gambling devices or as educational games. Each slip of paper concealed in the holes of the boards had printed upon it a question. When the boards were used as an educational

game, the person punching out the slip of paper, in order to win the game, must correctly answer the question. The operation of the board in the above manner was held not to be gambling or a game of chance or a lottery in the following cases. *D'Orio* v. *Startup Candy Co.*, 71 Utah 410, 266 Pac. 1037, 60 A.L.R. 338; *The Question Game Co.*, v. *Ploner*, 237 Ill. App. 187; *D'Orio* v. *Cataland*, 260 Ill. App. 626; *D'Orio* v. *Jacobs*, 151 Wash. 297, 275 Pac. 563; *Johnson* v. *McDonald*, 132 Ore. 622, 287 Pac. 220; *Boatwright* v. *State*, 118 Texas R. 381, 38 S.W. 2d 87.

At the hearings the petitioners were allowed to introduce some evidence on this point. However, at the places wherein the Commission allowed the petitioners to hold hearings, there was no evidence obtainable concerning this manner of operation. The petitioners were very anxious to introduce evidence concerning the extent and manner of the above operations but owing to the Examiner's ruling the petitioners were never afforded the opportunity of making such evidence a part of the record. Because of this the petitioners feel that it is unfair to have the court below discuss the merits of this manner of using the boards and condemning it as subterfuge.

It seems to the petitioners that it is an injustice to them to even discuss this proposition before the petitioners are given an opportunity to introduce their evidence concerning the matter. In fact, the petitioners feel that refusing to afford them the opportunity of going into the details of how the boards are used is a denial of their Constitutional right of due process of law because the hearing granted was certainly not a fair and impartial one. The injustice of this proposition seems self-evident to the petitioners when the court makes the following observation

"However, there is no evidence in the record that any punch board furnished by petitioners was ever actually used as a question and answer game."

In the face of the fact that the Petitioners requested the opportunity to introduce evidence on this point but the Commission refused to allow them to do so it is certainly unfair to make the above statement. If the petitioners had been granted the right to introduce their evidence there certainly would have been plenty of it to the effect that the boards were used in this manner.

The Case at Bar Is In Conflict with the case Scientific Mfg. Co. v. Federal Trade Commission, 124 F. 2d. 640 3rd Cir.

In this case the complaint issued by the Commission, alleged that Scientific Manufacturing Company, Inc., sold and distributed pamphlets principally through manufacturers of cooking utensils who were engaged in competition in commerce with manufacturers of aluminum ware. These pamphlets contained false and derogatory utterances concerning the use of aluminum in cooking utensils. The Commission charged that the act and practices of Scientific Manufacturing Company, Inc., constituted unfair methods of competition and unfair and deceptive acts and practices in commerce.

The Commission found the statements contained in the pamphlets were false and injurious to the aluminum industry and further found that the pamphlets supplied an "instrumentality by means of which uninformed or unscrupulous manufacturers, distributors, dealers and salesmen may deceive or mislead members of the purchasing public, and induce them to purchase utensils made from materials other than aluminum," and found the respondent guilty of "unfair and deceptive acts and practices in commerce." The Commission issued its cease and desist

order and Scientific Manufacturing Company, Inc., petitioned the Circuit Court of Appeals for the Third Circuit, asking that the order be set aside.

In this case the court said:

> "The Commission contends that its jurisdiction in the circumstances shown derives from the amendment of March 21, 1938, (c. 49 Sec. 5 [a], 52 Stat. 111, 15 U. S. C. A. sec. 45 [a]) which enlarged the original Federal Trade Commission Act by adding thereto a denouncement of "unfair or deceptive acts or practices in commerce" and by correspondingly empowering and directing the Commission to prevent the use of such acts or practices. From this, the Commission argues that the petitioners, being commercially engaged in an interstate business (the sale and distribution of pamphlets) are amenable to the Commission's interdictions when any of their acts or practices are found by the Commission to be unfair or deceptive in respect of some article of commerce in an *unrelated trade and notwithstanding such acts or practices are neither unfair nor deceptive in respect of the petitioners' trade in interstate commerce.* * * * *Obviously, a grant of power so vast is not to be accorded an administrative body except upon plain legislative direction within constitutional bounds. This brings us then to the matter of congressional intent for first consideration.*" (Italics provided).

Without equivocation the Third Circuit thus announced the principle of law that when petitioners' acts and practices are neither unfair nor deceptive in respect of the petitioners' trade in interstate commerce, the Commission has no jurisdiction to issue a cease and desist order. It is not claimed nor does the Commission contend or is it alleged or found that the petitioners' acts complained of are "unfair or deceptive" in respect of the petitioners' trade.

Likewise, the court without equivocation applies the rule of "strict construction" to the Federal Trade Commission Act. Accordingly, no court can construe the Federal Trade Commission Act so as to rule that the Federal Trade Commission has power to restrain methods, acts, and practices which are not unfair or deceptive in respect of the petitioners' trade in interstate commerce. Such a power must have a plain legislative direction within constitutional bounds. This essential direction the court holds is not included within the statute creating the Federal Trade Commission.

The court also said:

> "None the less, it was still the unfair acts of traders in the affected commerce that the Commission was empowered to enjoin * * * But the restrainable acts or practices in commerce continued to be such as are performed or perpetrated in the trade affected by the offenses, whether or not there is competition. In short, the Commission's intervention is limited to acts or practices in the affected trade. If the amendment were given any broader scope, the Act would relate to far more than trade practices * * *"

The power granted to the commission must have some limit. The petitioners feel that the limits placed on the commission by this case is logical and does not cramp the meaning of the Federal Trade Commission Act. Feeling this way the petitioners urge this Court to adopt this limitation and apply it to the case at bar.

CONCLUSION.

Wherefore, petitioners respectfully request that this Court grant their petition, require by certiorari that the cause be certified to It for review and determination, issue Its writ of certiorari to review the judgment of said Circuit Court of Appeals, hear, consider, and determine the questions presented and reverse the judgment, and order of said Court insofar as that judgment, and the holdings of the Court, are adverse to the petitioners' contentions.

Respectfully submitted,

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Statute:

Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45:

Section 5 2

Miscellaneous:

S. Rep. No. 221, 75th Cong., 1st Sess., p. 2 8

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 74

BERNICE FEITLER AND IRWIN FEITLER, INDIVIDUALLY AND TRADING AS GARDNER & COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (R. 144) is reported in 201 F. 2d 790.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1953 (R. 154–155), and a petition for rehearing, filed on Feburary 16, 1953, was denied on February 19, 1953 (R. 155). The petition for a writ of certiorari was filed on May

gift enterprise, or lottery scheme, and contain on their face instructions printed in accordance with customers' specifications which explain how the cards and boards are to be so used. (R. 28–29.)

A purchaser who "punches" the card or board separates a disc or printed slip, and discloses a previously concealed number. Certain specified numbers entitle purchasers to designated articles of merchandise without additional cost, and this merchandise is obtained for much less than its normal retail price. Persons who do not secure a winning number receive nothing for their money other than the privilege of making the push or punch. Articles of merchandise are thus distributed to the public wholly by lot or chance. The "only use" to be made of the boards and cards, except when they are used for gambling, is in combination with other merchandise so that such merchandise can be sold "by means of lot or chance." (R. 29–30.)

Many sellers and distributors of merchandise, such as candy, cigarettes, clocks, razors, cosmetics, and clothing, have purchased petitioners' cards and boards and distributed assortments of merchandise, together with such cards, to retail dealers, who have sold such merchandise to the public by the use of such cards and boards. Thus, petitioners have placed in the hands of others the means of conducting lotteries, gift enterprises, or games of chance in the public sale and distribution of merchandise. (R. 30–31.)

Members of the purchasing public have been induced to trade with retail dealers selling or distributing merchandise through push cards and punch boards. Competitors of such retail dealers are faced with the alternative of also using such devices in their business, or suffering the loss of substantial trade. Manufacturers, wholesalers, and jobbers who do not use push cards and punch boards in connection with the sale of their merchandise to retailers often have their sales and potential sales diverted to those who use such devices. (R. 31–32.)

The Commission concluded that the sale of merchandise through the use of push cards or punch boards is a practice which is contrary to an "established public policy" of the United States Government and is "in violation of criminal laws," and constitutes "unfair acts and practices" under the Federal Trade Commission Act (R. 32). The Commission ordered petitioners to cease and desist from selling or distributing in commerce push cards, punch boards, or other lottery devices which "are to be used or may be used" in the sale or distribution of merchandise to the public "by means of a game of chance, gift enterprise or lottery scheme" (R. 25).

ARGUMENT

1. Petitioners contend (Pet. 16–18, 33–36) that the "specific and substantial" public interest which the Act requires to justify the filing of a

complaint, cf. *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, 28, precludes the Commission from proceeding against practices which contravene generally accepted business standards, and limits it to preventing practices which are unfair to purchasers or competitors. We submit, however, that the Act clearly empowers the Commission to proscribe the unfair practices involved in this case.

In *Federal Trade Commission* v. *Keppel & Bro.,* 291 U. S. 304, this Court sustained a Commission order directed against interstate sales of "break and take" candy, arranged so that the retail purchaser of penny candy might, depending upon chance, get his money back or a prize, or pay a higher or lower price for his purchase. The Court stated that under the Act there was no essential difference between the use of chance as a sales appeal and the use of deception through misleading labeling; that devices whereby the amount of return for one's money depends upon chance have "met with condemnation throughout the community," and have long been "deemed contrary to public policy"; and that to hold that such practices were not "unfair" under the Act would be a "gross perversion of the normal meaning of the word." 291 U. S. 313. Cf. *Modernistic Candies, Inc.* v. *Federal Trade Commission,* 145 F. 2d 454 (C. A. 7), where the court, in sustaining a Commission order directed against the sale of chewing gum through punchboards, stated

(p. 455): "It is clear that the Federal Trade Commission has the power to eradicate merchandising by gambling in interstate commerce."

Since the *Keppel* case, Commission orders directed against interstate sales of products and devices designed to promote retail sales by appeal to customers' gambling instincts have been unanimously sustained by the various courts of appeals.[1]

At the time of the *Keppel* case, the Act prohibited only "unfair methods of competition," and to establish a violation it was necessary to

[1] *Hofeller* v. *Federal Trade Commission*, 82 F. 2d 647 (C. A. 7), certiorari denied, 299 U. S. 557; *Federal Trade Commission* v. *A. McLean & Son*, 84 F. 2d 910 (C. A. 7), certiorari denied, 299 U. S. 590; *Federal Trade Commission* v. *F. A. Martoccio Co.*, 87 F. 2d 561 (C. A. 8), certiorari denied, 301 U. S. 691; *Chicago Silk Co.* v. *Federal Trade Commission*, 90 F. 2d 689 (C. A. 7), certiorari denied, 302 U. S. 753; *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999 (C. A. 7), certiorari denied, 308 U. S. 610; *Ostler Candy Co.* v. *Federal Trade Commission*, 106 F. 2d 962 (C. A. 10), certiorari denied, 309 U. S. 675; *Koolish* v. *Federal Trade Commission*, 129 F. 2d 64 (C. A. 7), certiorari denied, 317 U. S. 683; *Jaffe* v. *Federal Trade Commission*, 139 F. 2d 112 (C. A. 7), certiorari denied, 321 U. S. 791; *Johnson Candy Co.* v. *Federal Trade Commission*, 78 F. 2d 717 (C. A. 7); *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. 2d 718 (C. A. 9); *Minter* v. *Federal Trade Commission*, 102 F. 2d 69 (C. A. 3); *Hill* v. *Federal Trade Commission*, 124 F. 2d 104 (C. A. 5); *Kritzik* v. *Federal Trade Commission*, 125 F. 2d 351 (C. A. 7); *Lee Boyer's Candy* v. *Federal Trade Commission*, 128 F. 2d 261 (C. A. 9); *Wolf* v. *Federal Trade Commission*, 135 F. 2d 564 (C. A. 7); *Loughran* v. *Federal Trade Commission*, 143 F. 2d 431 (C. A. 8); and cases cited in note 3, *infra*, pp. 9–10.

show that the unfair methods were injurious to competitors, although a showing of specific losses to particular competitors was not required. *Federal Trade Commisison* v. *Raladam Co.*, 283 U. S. 643; *id.*, 316 U. S. 149, 152. The Commission's power to prohibit "unfair or deceptive acts or practices," which was added to Section 5 by the Wheeler-Lea Act (52 Stat. 111) in 1938, authorizes the Commission to stop practices "unfair or deceptive to the public generally, * * * regardless of their effect upon competitors." S. Rep. No. 221, 75th Cong., 1st Sess., p. 2. The "unfair" practices which the amended Act prohibits are at least as broad in scope as the "unfair" methods of competition proscribed by the original statute. Clearly, it is an unfair practice to distribute merchandise at retail to the public through a game of chance—a practice which has long been "deemed contrary to public policy." *Federal Trade Commission* v. *Keppel & Bro., supra.*

Petitioners apparently contend that because the retail distribution of merchandise by means of their punch boards involved solely intrastate transactions, the Commission had no power to prohibit interstate sale of the boards.[2] But "sell-

[2] Petitioners frame this argument in terms of the absence of any Federal public policy against the intrastate distribution of merchandise through games of chance (Pet. 19–24). In support of this contention, they cite *United States* v. *Halseth*, 342 U. S. 277. The *Halseth* case does not aid petitioners. It held only that 18 U. S. C. 336, which prohibits mailing material "concerning any lottery," refers to an

ing in interstate commerce the means or instrumentalities by which merchandise can or may be sold by games of chance, gift enterprise or lottery is an unfair method of competition." *Zitserman* v. *Federal Trade Commission,* 200 F. 2d 519, 522 (C. A. 8). In *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483, a manufacturer used labels which tended to deceive a substantial part of the consuming public, but not the dealers to whom the manufacturer sold. This Court, holding that such a practice was an unfair method of competition under the Act, pointed out (p. 494) that it had long been a part of the law of unfair competition that a person is a wrongdoer who "furnishes another with the means of consummating a fraud." In the *Keppel* case, *supra,* the retail sales of the "break and take" candy were intrastate transactions; it was the interstate distribution of such candy, which made the unfair retail sales possible, that constituted the unfair method of competition.

Following the clear principles outlined above, the courts of appeals for six circuits have sustained without dissent the application of the Act to the interstate sale of punchboards used in the retail distribution of merchandise,[3] and this

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existing lottery, and that the mere mailing of punch boards and instructions is not a violation of that Section.

[3] *Bork Mfg. Co.* v. *Federal Trade Commission,* 194 F. 2d 611 (C. A. 9); *Globe Cardboard Novelty Co.* v. *Federal Trade Commission,* 192 F. 2d 444 (C. A. 3); *Consolidated Manufacturing Co.* v. *Federal Trade Commission,* 199 F. 2d

Court recently denied certiorari in one of those cases involving an order substantially the same as that in the instant case.[4]

Petitioners err in contending (Pet. 38–40) that the decision below is in conflict with *Scientific Mfg. Co.* v. *Federal Trade Commission,* 124 F. 2d 640 (C. A. 3). In that case the court held that the sale of pamphlets which attacked aluminum cooking utensils on health grounds was not an unfair practice, even though nonaluminum cooking utensil distributors had utilized the pamphlets. In *Globe Cardboard Novelty Co.* v. *Federal Trade Commission,* 192 F. 2d 444, which is in accord with the decision below, the Court of Appeals for the Third Circuit distinguished its earlier decision. It pointed out that the function of the pamphlets in the *Scientific Mfg.* case was to disseminate the opinions of their author, and their use in connection with the sale of nonaluminum merchandise was a "clear perversion" of their primary function. On the other hand, the punchboards in *Globe Cardboard,* like those of petitioners here, were "designed for the specific

417 (C. A. 4); *Chas. A. Brewer & Sons* v. *Federal Trade Commission*, 158 F. 2d 74 (C. A. 6); *Zitserman* v. *Federal Trade Commission*, 200 F. 2d 519 (C. A. 8); *Gay Games, Inc.* v. *Federal Trade Commission*, (C. A. 10, April 14, 1953); *Hamilton Manufacturing Co.* v. *Federal Trade Commission*, 194 F. 2d 346 (C. A. D. C.); *U. S. Printing & Novelty Co.* v. *Federal Trade Commission*, (C. A. D. C., June 4, 1953).

[4] *Lichtenstein* v. *Federal Trade Commission*, 194 F. 2d 607 (C. A. 9), certiorari denied, 344 U. S. 819, rehearing denied, 344 U. S. 882.

purpose of selling merchandise by lottery." 192 F. 2d at 447.

2. Petitioners argue (Pet. 36–38) that they were denied a fair hearing because they were not allowed to offer additional evidence that their punchboards were used as educational games. After extensive hearings, during which petitioners admittedly introduced "some evidence" on this issue (Pet. 37), petitioners requested that further hearings be held in thirteen states (R. 35–37). The examiner denied the request, but stated that further hearings would be had in any area in which petitioners' customers had been shown to have sold merchandise through punchboards (R. 36).

We submit that the court of appeals correctly held (R. 147, 150) that petitioners were not prejudiced by this ruling.[5] For it is clear that the examiner did not abuse his discretion in declining, after the Commission had introduced extensive evidence relating to "conditions existing in fairly well defined territory," to conduct further protracted hearings relating to "conditions existing in other and far remote territory" (R. 35). Petitioners made no specific offer of proof that their boards were used as educational games, and their proffered evidence that the boards were operated

[5] The printed record does not contain the rulings of the examiner to which petitioners except. Cf. *Zitserman* v. *Federal Trade Commission*, 200 F. 2d 519, 521 (C. A. 8). However, portions of the rulings are set forth in a petition to reopen the proceedings (R. 33–37), which the Commission denied (R. 62–63).

in taverns and poolrooms, and were played to satisfy a gambling instinct (R. 148), would hardly be probative of such use. Nor would the additional evidence have supported petitioners' contention that the Commission had no jurisdiction over their practices (R. 150). As the court of appeals stated, the Commission's jurisdiction "does not depend upon any particular effect of the operation of punch boards and push cards upon merchandising competition, but upon the single fact that these devices, unlike most other gambling devices, are used as a means of selling or distributing merchandise which is opposed to the public policy of the United States" (R. 149).

CONCLUSION

The decision below is clearly correct, no question of general importance is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioners,

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petition for Rehearing

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the above named petitioners and respectfully petition the Court for a rehearing hereof for the following reasons.

This petition is based on two grounds: (1) that the order sustained by the Court below is in conflict with the order sustained in the case of *Hamilton Manufacturing Co.*

v. *Federal Trade Commission*, 194 F. (2d) 346; (2) that the order in the case at bar violates the policy laid down by Congress that the Federal Government should not unduly interfere with the police powers of the States.

Taking up the first ground. The Circuit Court of Appeals for the District of Columbia in the *Hamilton* Case, *supra*, holds that the order issued in the case at bar is too indefinite. The Court in the *Hamilton* Case therefore modified the order so that the Hamilton Company is only restrained from shipping boards which are designed or intended to be used for the distribution of merchandise; while on the other hand, these petitioners are restrained from shipping punch boards in interstate commerce which are to be used or *which may be used* to distribute merchandise. It is self-evident from the above that it is an unwarranted discrimination to restrain one concern from shipping punch boards in interstate commerce which may be used to distribute merchandise, while his competitor shipping identical punch boards is only restrained from shipping boards which are designed or intended to be used for the distribution of merchandise. Such a discrimination clearly violates the due process clause of the Fifth Amendment to the Constitution.

Concerning the second ground. The construction placed upon the Federal Trade Commission Act by the Court below is clearly violative of the policy laid down and adhered to by Congress that Congress will not interfere with strictly intrastate affairs. For this reason it seems to the petitioners that the intrastate use of punch boards to distribute merchandise cannot be used as a basis for the *inference* that Congress by the passage of the Federal Trade Commission Act intended to give the Commission jurisdiction to stop the interstate shipment of punch boards which are to be used in intrastate transactions to dis-

tribute merchandise. This is especially true when it is borne in mind that many States and sub-divisions thereof have expressly legalized such use of punch boards. This interpretation of the statute amounts to saying that Congress has said to the States that no matter whether a State or sub-division thereof has placed its stamp of approval upon the use of punch boards to distribute merchandise Congress nevertheless characterizes such transactions as being of such a nature that they must be prohibited or that Congress will use every means within its power to stop such transactions. Congress has never intended to so characterize a strictly intrastate transaction.

This interpretation of the statute also violates Congress's avowed policy that when Congress wishes to stop the interstate shipment of any merchandise because of its detrimental intrastate effect Congress has always done so by an express and unequivocal enactment.

CONCLUSION.

Wherefore, petitioners respectfully request that this Court grant their petition, require by certiorari that the cause be certified to it for review of the judgment of said Circuit Court of Appeals, hear, consider, and determine the questions presented and reverse the judgment and order of said Court insofar as that judgment, and the holdings of the Court, are adverse to the petitioners' contentions.

Respectfully submitted,

GEORGE E. LINDELOF, JR.,
Attorney for Petitioners.

F. W. JAMES,
Of Counsel.

CERTIFICATE.

Comes now the undersigned, one of the attorneys for the petitioners herein and hereby certifies that this Petition is presented in good faith and is not interposed for delay and further certifies that this Petition is restricted to a ground available to the petitioners although not previously presented.

F. W. JAMES.